

1. Heard Mr. SS Sarma, learned senior counsel for the appellant. No one appears for the respondents though the names of the learned counsel appearing for the respondent/claimant are reflected in the cause list.

2. The appellant has filed the appeal under Section 30 of the Workmen's Compensation Act challenging the award dated 28.1.2000 passed by the learned Commissioner, Workmen's Compensation, Nagaon in Case No. NWC 68/99. The grounds on which the award has been challenged are that - (i) the learned Commissioner has assessed the loss of earning capacity of the workman concerned without regard being had to the percentage of loss of earning capacity specified in Schedule I as required under Explanation II to Clause (c) to sub section 1 of Section 4; (ii) such loss of earning capacity has been assessed as 50 % on the basis of the medical certificate (Ext. 3) certifying the physical disability and not the loss of earning capacity; and (iii) without ascertaining whether the injuries sustained by the workman resulted in permanent partial disablement or temporary disablement within the meaning of the said Act.

3. Vide order dated 3.4.2000, the appeal has been admitted for hearing on the substantial question of law as to whether the learned Commissioner, Workmen's Compensation can assess the compensation without taking into consideration the Explanation II to Section 4(1)(c) of the Act.

4. Mr. Sarma, learned senior counsel for the appellant referring to the impugned award dated 28.1.2000 has submitted that the learned Commissioner has awarded the compensation by taking the loss of earning capacity of the workman as 50 % on the basis of the medical certificate (Ext. 3) issued by the Medical practitioner assessing the physical disability at 50% without there being any assessment of loss of earning capacity as required by Section 4 (1)(c)(ii) of the Act. It has also been submitted by the learned senior counsel that the learned Commissioner also did not consider the percentage of loss of earning capacity in relation to different injuries specified under Section 1 of the Act as required under Schedule (II) to Section 4(1)(c) while assessing the loss of earning capacity of the workman concerned. The further submission of the learned senior counsel is that the award was passed without also ascertaining as to whether the injuries sustained amounts to permanent partial disablement so as to award compensation under Section 4(1)(c) or temporary disablement entitling the workman to get the award under Section 4(1)(d) of the Act. The learned senior counsel, therefore, submits that the award passed by the learned Commissioner may be set aside and the matter be remitted to the learned Commissioner for fresh decision.

5. It appears from the record that the respondent No. 1/claimant has filed the application claiming compensation under the provision of the Act contending inter alia that while he was driving a motor vehicle bearing registration No. AS-02 6009 (609 Bus), it met with an accident on 31.5.2009 at about 4.30 P.M. in a place near Samuguri Police Station in the district of Nagaon and as a result of which he has sustained injuries. It has also been contended in the said application claiming compensation that the respondent No. 1 workman received such injuries in course of and arising out of employment as a driver. In the said proceeding apart from the employer i.e. the owner of the motor vehicle, the present appellant has also been arrayed as opposite parties since there was a contract of insurance with the appellant Insurance Company in respect of the liability in relation to the vehicle in question.

6. The owner of the vehicle i.e. the employer filed the written statement admitting the claim of the respondent/workman. It has also been contended that since there is a contract of insurance between the appellant Insurance Company and him, the amount, if any, payable is to be paid by the Insurance company. The present appellant who was the opposite party No. 2 also contested the proceeding by filing the written statement denying all the averments made and put the workman to prove the facts.

7. The respondent/workman in support of his claim examined himself and proved 18 documents which includes the medical certificate (Ext. 3) issued by the doctor attending him. The learned Commissioner upon appreciation of the evidence on record passed the order awarding the compensation of Rs. 1,22,310/- with interest at the rate of 12% per annum, which was quantified at Rs. 9705.90, totaling Rs. 1,32,015.90 and directed the appellant to satisfy the said award, in view of the contract of insurance between the employer and the Insurance Company.

8. In the present appeal, the factum of accident, the monthly wage and the injuries sustained by the workman arising out and in course of his employment have not been challenged and, therefore, are not required to be gone into. The contract of insurance between the appellant Insurance Company and the employer/respondent No. 2 is also not under challenge. As noticed above, the appellant Insurance Company has challenged the award on the ground that the learned Commissioner has assessed the loss of earning capacity on the basis of the medical certificate (Ext. 3) issued by the attending doctor certifying the percentage of physical disability of the workman concerned without there being any certification relating to the loss of earning capacity as required under Section 4(1)(c)(ii) of the Act and that there is no finding as to whether such injuries result in permanent partial disablement or temporary disability. The other ground of challenge is that the loss of earning capacity has been assessed without regard being had to the percentage of loss of earning capacity and without taking into consideration as provided in Explanation II of Section 4(1)(c) of the Act.

9. It appears from the impugned award that the claimant proved the medical certificate issued by the attending doctor as Ext. 3 who certified that the physical disablement of the workman as 50%. Such certificate was issued on 10.6.1999. The learned Commissioner has assessed the loss of earning capacity of the workman at 50% solely based on the said certificate (Ext. 3) certifying the percentage of physical disability of the workman concerned.

10. Section 4(1)(c)(ii) provides that where permanent partial disability resulted from the injury not specified under Schedule I, the percentage of the compensation payable in respect of the permanent total disablement has to be proportionate to the loss of earning capacity as certified by the medical practitioner permanently caused by the injury. Explanation II to Section 4(1)(c) also requires that in assessing the loss of earning capacity for the purpose of sub clause (ii) of clause (c) of sub section (1) of Section 4 of the Act, the qualified medical practitioner shall have due regard to the percentage of loss of earning capacity in relation to the different injuries specified in Schedule I.

11. Upon reading the said provision of law it, therefore, appears that the loss of earning capacity is to be assessed by the qualified medical practitioner having due regard to the loss of earning capacity in relation to the different injuries specified in Schedule I of the Act.

12. In the instance case, as noticed above, there was no assessment of loss of earning capacity by the medical practitioner in the certificate issued by it, which has been proved by the workman as Ext. 3. What has been certified by the said certificate is the percentage of physical disability. The learned Commissioner has taken the percentage of physical disability as the loss of earning capacity, which is not permissible in law. The learned Commissioner has also not recorded any finding as to whether the injuries sustained by the workman resulted in permanent partial disablement or temporary disablement, total or partial, which the learned Commissioner is required to do as the amount of compensation payable in respect of the aforesaid contingency are different.

13. In view of the aforesaid discussions, the impugned award dated 28.1.2000 is set aside. The matter is remitted to the learned Commissioner to decide the case No. NWC 68/99 afresh, if necessary by allowing parties to adduce further evidence. It is, however, made clear that if the amount as awarded by the learned Commissioner has already been disbursed to the workman concerned, which fact could not be ascertained from the records as produced by the learned Commissioner and also due to non appearance of the learned counsel appearing for the workman, the learned Commissioner shall not proceed to decide the said proceeding in terms of the direction passed by this Court, as it is quite impossible, keeping in view the economic condition of the workman concerned, to recover the amount from him.

14. The appeal is accordingly allowed with the aforesaid directions.  
No cost.

15. The Registry is directed to send down the records forthwith.